Supreme Court, U.S.
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No. 86-1185

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ERNEST KETTELSON,

Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED*

Whether the Illinois Appellate Court erred in holding that petitioner's purported state law action, challenging respondent's transmission of microwave signals from a federally-permitted telecommunications transmitting facility, was barred by well-established principles of federal preemption law, a holding which does not conflict with any prior holding of this Court or any state or federal appellate court.

* Petitioner Ernest Kettleson is an individual. Respondent MCI Telecommunications Corporation is a wholly-owned subsidiary of MCI Communications Corporation, which has no subsidiaries that are not wholly-owned. The following are affiliates of MCI Telecommunications Corporation: MCI Transponder Leasing, Inc.; MCI/TAS Corp.; MCI Cellular Telephone Co.; MCI Air Signal of California, Inc.; MCI Air; MCI Services Corp.; MCI Galaxy III Transponder Leasing, Inc.; MCI Equipment Acquisition Corp.; MCI Data Processing, Inc.; Advantage Co., Ltd.; MCI International, Inc.; Western Union International, Inc.; MCI International Telecommunications Corp.; WUI Sales Corp.; WUI Service Corp.; Western Union International, S.R.L.; Western Union International, A.R.L.; S.A. Western International, N.V.; Western Union International, N.V.; Western Union International, Gmbh; British Western Union, Ltd.; and Western Union International, S.A.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The order of the Circuit Court for the 16th Judicial Circuit, Kendall County, Illinois (Pet. App. 10a) is not reported. The order of the Illinois Appellate Court, Second District (Pet. App. 1a) is an unpublished order which may not be cited as precedent under Rule 23 of the Illinois Supreme Court Rules, Ill. Rev. Stat. ch. 110A, § 23 (1985). The order of the Illinois Supreme Court denying the petition for leave to appeal (Pet. App. 12a) is not reported.

ADDITIONAL STATUTE INVOLVED

Section 214 of the Federal Communications Act, 47 U.S.C § 214 (1982), states:

> (a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line . . .
>
> * * *
>
> (c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment or service covered thereby.

STATEMENT OF FACTS

1. The Parties.

Petitioner Ernest Kettelson, an attorney, has owned a certain parcel of land in Kendall County, Illinois since July 1, 1968. Respondent MCI Telecommunications Corporation ("MCI") is a telecommunications common carrier licensed by the FCC to transmit long-distance telecommunications messages through, among other things, the transmission of microwave signals. At about the time that petitioner purchased his Kendall County property, MCI erected two transmitting towers nearby. MCI uses these towers, with the approval of the FCC, as part of its nationwide telecommunications system, which transmits microwave signals over countless parcels of land throughout the United States. (Ill. App. 2.)[1]

2. The State Trial Court Proceedings.

In petitioner's original Complaint, which was filed in the Circuit Court for the Sixteenth Judicial Circuit, Kendall County, Illinois, on December 23, 1983, he claimed that MCI's transmission of intangible microwave signals over his property constituted a continuing trespass. Petitioner claimed that he was entitled to damages for MCI's past transmissions, and he also sought an injunction prohibiting all future transmissions. MCI filed a motion to dismiss, which was granted on July 5, 1984. At the same time, the Circuit Court granted leave to amend. (R. C-4 to C-7; Ill. App. 2.)

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[1] The abbreviation "Ill. App." will be used in this brief to refer to the Appendix attached to MCI's Answer to Petitioner's Petition for Leave to Appeal, which was filed in the Illinois Supreme Court on July 5, 1986. "R." refers to the common law record.

On July 26, 1984, petitioner filed his Amended Complaint, which consisted of four counts and added two new claims. First, petitioner asked that the Circuit Court impose a constructive trust on MCI because of its allegedly wrongful transmission of signals over his property. Second, petitioner also sought constructive trust relief on behalf of a purported nationwide class of persons over whose property MCI transmits any of its telecommunications signals. In addition, petitioner asked that the Circuit Court set aside its order of July 5 and reinstate the claims contained in his original Complaint. (R. C-59 to C-64; Ill. App. 3.)

MCI moved to dismiss petitioner's Amended Complaint and opposed his motion to reinstate the original Complaint. MCI argued that neither the original Complaint nor the Amended Complaint stated a valid state law claim for trespass or for constructive trust, and that such claims were preempted by federal law in any event. On March 5, 1985, the Circuit Court, after reviewing the briefs and hearing oral argument, dismissed petitioner's Amended Complaint and denied his motion to vacate the July 5 order. (Ill. App. 3; Pet. App. 10a-11a.)

3. The State Appellate Court and Supreme Court Proceedings.

On appeal to the Illinois Appellate Court, Second District, the parties briefed all issues previously raised in the Circuit Court, including federal preemption. Petitioner's appeal was argued orally on April 15, 1985, but petitioner failed to appear for the argument.

On June 5, 1986, the Appellate Court affirmed the judgment of the Circuit Court in an unpublished, non-precedential order entered pursuant to Illinois Supreme Court

Rule 23, Ill. Rev. Stat. ch. 110A, § 23 (1985).[2] Observing that not all activities of interstate communications companies are exempt from state control, the Appellate Court held that the restrictions of the kind sought by petitioner, which would substantially disrupt the physical transmission network, have been preempted by federal law. Because of its holding on the preemption issue, the Appellate Court had no occasion to reach the state law issues raised by MCI. (Pet. App. 8a.)

The Appellate Court based its holding on the Federal Communications Act, 47 U.S.C. §§ 151, *et seq.*, which comprehensively regulates interstate telecommunications. The Appellate Court found that one of the fundamental purposes of the Act is to maintain uniform rates and services throughout our system of interstate telecommunications. The court then found that the state law remedies which petitioner sought would undermine this fundamental purpose. The Appellate Court reasoned (Pet. App. 6a-7a):

> [I]f the remedies he [petitioner] seeks were to be implemented, the result would be the most direct, obvious, and drastic disruption of interstate telecommunications imaginable. The carriers would have to either move and rearrange all their transmitting equipment with no guarantee that they would not have to move again in the future, or assume the burden of compensating every owner of property located under the paths created by their transmissions. The character of telecommunications in this State would necessarily change. Presumably, the

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[2] The Appellate Court entitled its ruling, "Order of the Appellate Court Pursuant to Supreme Court Rule 23" and noted at the upper margin that "[t]his order is not precedential and [is] not to be published." (Pet. App. 1a.) Under Illinois Supreme Court Rule 23, such orders have no precedential value. Ill. Rev. Stat. ch. 110A, § 23.

> character of telecommunications could vary widely, and even conflict, from State to State. There could be no more telling blow to the uniformity and efficient service and reasonable charges sought after by the Federal Communication Act in the area of interstate telephone communications. And this does not even consider the far broader implications that plaintiff's suggestions would have for the entire telecommunications field, including radio and television.

Petitioner subsequently filed a petition for leave to appeal in the Illinois Supreme Court. The petition for leave to appeal was denied, without dissent, on October 2, 1986. (Pet. App. 12a.)

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied because the unpublished, non-precedential order of the Illinois Appellate Court does not conflict with any prior decision of this Court or any state or federal appellate court. Indeed, the correctness of the Appellate Court's preemption ruling is manifest from the very grounds upon which petitioner seeks, in the absence of a conflict, to establish the purported need for review by this Court in this case. For example, petitioner asserts that review should be granted because the nationwide systems of microwave telecommunications maintained by MCI and others, pursuant to federal licensing and regulation, constitute threats to the national defense, health and economic well-being. (Pet. 9-13.) These fanciful arguments do nothing to advance petitioner's argument in favor of Supreme Court review in this case, but they demonstrate with abundant

clarity the correctness of the Illinois Appellate Court's preemption ruling. If such arguments are to be heard at all, they clearly must be addressed in a federal forum, and not under the guise of a state court trespass action.

I.

THE DECISION BELOW IS CORRECT AND DOES NOT CONFLICT WITH ANY PRIOR DECISION OF THIS COURT.

The Illinois Appellate Court found that petitioner's challenge to the transmission of interstate telecommunications was preempted by the Federal Communications Act, 47 U.S.C. §§ 151, *et seq.* The Appellate Court reasoned that the Act showed Congress's intent to exclude states from regulating the actual transmission of telecommunications signals, and also that the state law burdens petitioner sought to impose on interstate telecommunications would frustrate the central purposes of the Act. (Pet. App. 4a-8a.)

The reasoning of the Appellate Court fully accords with this Court's prior decisions finding federal preemption. For example, in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), this Court recently held that certain state regulation of cable television signals and programming was preempted by the Federal Communications Act and FCC regulations. In so holding, this Court set out the "familiar and well-established principles" governing federal preemption (467 U.S. at 698-99; citations omitted):

> [T]he enforcement of a state regulation may be preempted by federal law in several circumstances: first, when Congress, in enacting a federal statute, has expressed a clear intent to pre-empt state law . . .; second, when it is clear, despite the absence of explicit pre-emptive language, that Congress has intended, by legislating comprehensively, to occupy an entire field

> of regulation and has thereby "left no room for the States to supplement" federal law . . .; and, finally, when compliance with both state and federal law is impossible, . . . or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

In another recent case, *Edgar v. Mite Corp.*, 457 U.S. 624 (1982), this Court based its decision on the final part of the three-pronged preemption test. In *Edgar*, the Court struck down an Illinois state takeover statute because its requirements were substantially more stringent than those of the Williams Act, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f). The Court observed that while it was theoretically possible to comply with the provisions of both statutes, the Illinois statute still "frustrates the objectives of the Williams Act" by upsetting "the careful balance struck by Congress" between rights of investors to information and of others to bid freely in the open securities markets. (457 U.S. at 632, 634). Because of this substantial frustration of congressional "purposes and objectives," the Illinois law was preempted. (457 U.S. at 634.)

Federal preemption of matters affecting uniform and efficient telecommunications services is well-established, and its application here to the interstate transmission of signals presents no significant legal question warranting review by this Court. The transmission of microwave signals is a core activity of the rapid, efficient nationwide system of telecommunications services that is the goal of the Federal Communications Act. (47 U.S.C. §§ 151, *et seq.*) Among other sections, Section 214 of the Act clearly evidences Congress's intent to preempt any disruptive state regulation of these core activities. (47 U.S.C. § 214.) Section 214 requires telecommunications carriers to obtain FCC certificates before constructing and operating "any channel of communication established by the use of appro-

priate equipment" making up interstate telecommunications systems, and the FCC can impose on the certificate any conditions required by "the public convenience or necessity." (47 U.S.C. § 214(c).) Hence, the Act calls for the FCC, not the states, to impose conditions on the operations of interstate telecommunications systems, including the radio wave transmission system at issue here.[3] Indeed, MCI has operated its microwave transmission system since the early 1970's under certificates granted by the FCC pursuant to Section 214 of the Act. *See, e.g., MCI Telecommunications Corp. v. FCC*, 561 F.2d 365, 369 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978).

More generally, the federal government has occupied the field of interstate telecommunications by the long-standing and comprehensive statutory framework enacted by Congress and by regulations promulgated and administered by the FCC, "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide,

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[3] The cases upon which petitioner relies (Pet. 25-33, 38-39) are not to the contrary. For example, *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), dealt almost entirely with another federal statute, the Copyright Act, 17 U.S.C. §§ 101, *et seq.* Petitioner's reliance (Pet. 28-29) on this case is necessarily limited to a footnote in the opinion, which has nothing to do with preemption and is limited to the observation that the FCC cannot affect rights under the Copyright Act.

Petitioner's reliance (Pet. 29-33) on *Louisiana Public Service Commission v. FCC*, ___ U.S. ___, 106 S. Ct. 1890 (1986), is also misplaced. That case involved this Court's recognition of separate systems of accounting principles, one for interstate service and one for intrastate service. Here, by contrast, petitioner seeks to impose state common law regulation on the physical transmission of interstate telecommunications services. The authorization of the physical means of transmitting interstate services is a matter reserved to the FCC. (47 U.S.C. § 214.)

and world-wide wire and radio communication service with adequate facilities at reasonable charges." (47 U.S.C. § 151.) The Act applies "to all interstate and foreign communication by wire or radio . . . and to all persons engaged within the United States in such communication." (47 U.S.C § 152(a).)

The federal courts have consistently found that the federal government has preempted state regulation of the physical provision of interstate telecommunications. The courts have repeatedly held that "the establishment of this broad scheme [of federal law] for the regulation of interstate service by communications carriers indicates an intent on the part of Congress to occupy the field to the exclusion of state law." *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.*, 391 F.2d 486, 490 (2d Cir. 1968).[4] In sum, as this Court has recognized, the Federal Communications Act has established a "comprehensive scheme for the regulation of interstate communication." *Benanti v. United States*, 355 U.S. 96, 104 (1957) (footnote omitted).

Finally, the onerous restrictions which petitioner seeks to impose on the interstate transmission of telecommunications signals plainly would frustrate the purposes and objectives of Congress. The Act explicitly states that its purpose is to make available "a rapid, efficient, Nation-wide and world-wide wire and radio communication service with

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[4] *Accord Computer and Communications Industry Association v. FCC*, 693 F.2d 198, 214-18 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *New York Telephone Co. v. FCC*, 631 F.2d 1059, 1064-65 (2d Cir. 1980); *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036, 1045 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977); *North Carolina Utilities Commission v. FCC*, 537 F.2d 787, 793 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *Vaigneur v. Western Union Telegraph Co.*, 34 F. Supp. 92, 93-94 (E.D. Tenn. 1940).

adequate facilities at reasonable charges." (47 U.S.C. § 151.) As the Appellate Court observed, the numerous transactions and burdensome charges that petitioner seeks to impose would cause "the most direct, obvious and drastic disruption of interstate telecommunications imaginable." (Pet. App. 6a.) Indeed, this Court need look no further than the petition in this case to visualize the degree of disruption threatened by state lawsuits such as these. Petitioner candidly admits (Pet. 9-13) that he seeks to use this lawsuit to try issues relating to alleged dangers to the national security, health and economic well-being allegedly caused by this federally-licensed and regulated system of telecommunications.

The decision below is clearly correct and fully accords with this Court's prior decisions.

II.

THE DECISION BELOW DOES NOT CONFLICT WITH ANY PRIOR DECISION OF ANY STATE OR FEDERAL APPELLATE COURT.

Petitioner cannot point to a single state or federal appellate court decision that conflicts with the decision below. Instead, petitioner attempts to rely (Pet. 38) on two Florida intermediate appellate court decisions which do not involve telecommunications and have nothing whatever to do with the issue presented in this case. *Florida Power & Light Company v. Roberts*, 490 So. 2d 969 (Fla. App. 1986), and *Florida Power & Light Co. v. Jennings* 485 So. 2d 1374 (Fla. App. 1986), involved condemnation of easements for electric power lines pursuant to well-established state laws. In neither of those cases was any issue raised with respect to any overriding federal interest. Finally, petitioner attempts to rely (Pet. 38-39) on an unpublished verdict or order from a Texas trial court

(*Klein Independent School District v. Houston Power and Lighting Company*, County Civil Court, Harris County, Texas, No. 393-755), another electric power line easement case in which no question of federal preemption was raised.[5]

In sum, there is no conflict warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[5] Petitioner also apparently asserts (Pet. 16-17), without any support, that the approach taken by the Illinois courts in this case will somehow result in a wholesale federal takeover of Illinois real estate law. Even if that were a real danger, which it clearly is not, the Illinois courts certainly can be expected to deal with it.